

# CRIMINAL YEAR SEMINAR

March 4, 2011- Phoenix, Arizona

March 18, 2011- Tucson, Arizona

March 25, 2011- Mesa, Arizona



## 2011 CRIMINAL RULES UPDATE

Presented By:

**JUDGE MICHAEL JONES**

Maricopa County Superior Court  
Phoenix, Arizona

Distributed By:

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# Criminal Rules 2011

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## Rule 6.1(a) Right To Counsel

State v. Rumsey, 225 Ariz. 374, 238 P.3d 642 (Ct. App. 2010)

- The right to be represented by an attorney --per Rule 6.1-- includes the right to consult w/ an attorney as soon as possible after Defendant is taken into custody (as long as consultation does not interfere w/ ongoing investigation).
- Defendant charged w/ Manslaughter, Agg Assault, DUI, & Leaving Scene of Accident.
- Defendant denied Rule 6.1 right of counsel when police failed to inform Defendant that her attorney was at the station before blood draw. Police had warrant for blood draw.
- Denial of Rumsey's motion to suppress & dismiss upheld as 'no connection between the lawless conduct & the discovery of the challenged evidence (blood draw)'

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## Rule 6.1(a)

Rumsey, con't.

- Rumsey did not claim that violation of her right to counsel deprived her of exculpatory evidence. Therefore, dismissal not an appropriate remedy.
- Trial court did not err in denying motion to suppress the blood evidence, and only precluding those statements made by Rumsey during the blood (in violation of her right to counsel).

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**Rule 6.1(c) Waiver of  
Right To Counsel**

State v. Gunches, 225 Ariz. 22, 234 P.3d 590 (2010).

- Gunches pled guilty to kidnapping & First Degree Murder, and claimed that trial court erred in finding him competent and allowing him to represent himself.
- The standard of competency to waive counsel is the same standard of competency to stand trial.
- 3 doctors found Gunches competent

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**Rule 7.6(c)  
Bond Forfeiture**

State v. Eazy Bail Bonds, 224 Ariz. 227, 229 P.3d 239 (Ct. App. 2010).

- President of bail bond company (not an attorney) not allowed to represent it in court (Rule 31 of Ariz. Supreme Court Rules)
- Trial court correctly forfeited bond when bond company failed to appear and defend at forfeiture hearing.

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**Rule 7.6(c)  
Bond Forfeiture**

State v. Bail Bonds, 223 Ariz. 394, 224 P.3d 210 (Ct. App. 2010).

- Trial court erred in forfeiting bond of Defendant who was in federal custody (and had not yet been deported) at time of her failure to appear in state court proceedings.

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**Rule 8.2(a)(4)**  
**time limits for capital cases**

Rule change, effective 9/2/10:

- Deadline for trial in capital criminal cases extended from 18 months to 24 months.

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**Rule 10.2**  
**Change of Judge**

Rule change, effective 12/10/10:

- Removes language in Rule that Notices of Change of Judge in capital cases shall be filed w/in 10 days of filing of State's intention to seek D.P.
- So, same time limits in D.P. cases as in all criminal cases, w/in 10 days of:
  1. Arraignment
  2. Filing of appellate mandate w/ Clerk
  3. Notice of assignment of a judge

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**Rule 11 Competency**

State v. Lynch, 225 Ariz. 27, 234 P 3d 595 (2010).

- Based on Rule 11 expert reports Lynch found not competent & restoration ordered. Five months later Lynch found restored & competent.
- Six months later defense counsel filed 2<sup>nd</sup> Rule 11 motion alleging that Defendant suffered from delusions & could not assist in his defense.
- Trial court denied 2<sup>nd</sup> Rule 11 motion.
- No error because Lynch's atty did not allege any new information to "call into question the court's previous finding of competency"—Lynch's delusions were addressed in prior Rule 11 experts' reports, not so severe to render him incompetent

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### **Rule 11.2**

#### **Competency Pre-screen**

Potter v. Vanderpool, 225 ariz. 495, 240 P.3d 1257 (Ct. App. 2010).

- Special Action proceedings in 2 cases where Superior Court Judge reversed Justice of the Peace, who had found per Rule 11.2 that reasonable grounds exist to order Rule 11.
- Superior Court does not have authority to substitute its own reasonable grounds determination, but must order full Rule 11 evaluation to determine Defendants' competency.

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### **Rule 11.5**

#### **Competency Hearing**

State v. Kuhs, 223 Ariz. 376, 224 P.3d 192 (2010).

- Kuhs contended that attorneys stipulated to his competency and deprived him of a hearing.
- Ct. found that attorneys stipulated that trial court could determine competency based upon expert's report— consideration of the report (stipulated evidence) was the hearing.

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### **Rule 12.9**

#### **Challenge to Grand Jury**

State v. Snelling, 225 Ariz. 182, 236 P.3d 409 (2010).

- Defendant alleging prosecutorial misconduct in Grand Jury proceedings may challenge denial of his motion for new finding of probable cause only through special action proceedings.
- Only exception to this rule is where indictment is based on material, perjured testimony.

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### **Rule 13.1 Information**

State v. Maldonado, 223 Ariz. 309, 223 P.3d 653 (2010).

- Defendant charged w/ Poss of Cocaine; ME shows information filed, information was read to trial jurors; however, no information was in court's file-- prosecutor filed 13 mo after trial.
- Failure to timely file information did not deprive Superior Court of jurisdiction, overruling State v. Smith(1948) & Paxton v. Walters(1951).
- Information was, most likely, mis-filed by clerk!!

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### **Rule 13.3 Joinder of offenses**

State v. Mason, 225 Ariz. 323, 238 P.3d 134 (Ct. App. 2010).

- Mason convicted of 2 cts Agg Assault based on accomplice liability where two separate men beat victim at direction of Mason.
- Ct. found indictment 'multiplicitous' in that it charged one crime in two counts.
- Although the assault was carried out by two principals, it was a single attack.
- One of the two convictions violated Double Jeopardy.

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### **Rule 15.8 Discovery prior to plea deadline**

Rivera-Longoria v. Slayton, 225 Ariz. 572, 242 P.3d 171 (Ct. App. 2010).

- Rule 15.8 provides that court may impose sanctions for failure to provide defense with material disclosures at least 30 days prior to any plea deadline.
- Prosecutor's withdrawal of plea offer was a "deadline" w/in meaning of rule

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**Rule 15.9(b)**  
**Ex Parte proceedings**

Morehart v. Barton, 225 Ariz. 269, 236 P.3d 1216 (Ct. App. 2010).

- Tr. Court set "mitigation conference" (former procedure in Maricopa County to appoint "mitigation masters").
- Ex parte hearings held pursuant to Rule 15.9 violate victims' right to be present at all proceedings.

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**Rule 16.6**  
**Dismissal Prosecutorial vindictiveness**

State v. Mieg, 225 Ariz. 445, 239 P.3d 1258 (Ct. App. 2010).

- Mieg initially charged w/ one count of Poss. Dang. Drug (Meth)— mistrial after officer mentions precluded info.
- State indicts Mieg on Poss. Dang. Drug and Poss. Drug Para. Mieg's motion to dismiss for prosecutorial vindictiveness is granted by trial court.
- Reversed, by Div. 1

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**Rule 16.6**  
**Dismissal Prosecutorial vindictiveness**

Mieg---

- 2 ways to prove pros. vindictiveness:
  1. Actual vindictiveness— objective evid that the prosecutor acted in order to punish the defendant for asserting his/her legal rights
  2. Presumption of vindictiveness where circumstances establish a "realistic likelihood of vindictiveness".
- Here, prosecutor acted to respond to an adverse evidentiary ruling by changing strategy— adding the Poss. Drug Para. charge

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## Rule 17 Guilty Pleas

State v. Szpyrka, 223 Ariz. 390, 224 P.3d 206 (Ct. App. 2010).

- Defendant entitled to Rule 32 relief when prior conviction is reversed– and that prior formed basis for admission of prior in his plea agreement.
- Trial court erred in remanding for new sentencing under court-modified plea agreement, trial court should have granted Rule 32, vacated & set for trial.

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## Proposed amendment to Rule 17.1: Mail Pleas

Open for comments until 5/20/11:

- Proposed amendment would allow guilty/no contest pleas by mail in limited jurisdiction courts to misdemeanors & petty offenses.
- Exceptions:
  1. Cases involving victims
  2. Where court may impose a jail term (except where 'time served' or Defendant is currently in jail & sentence would be concurrent)
  3. Cases where court may sentence to probation
  4. Offenses for which ARS§ 13-607 require taking of fingerprints
  5. Any other case where entry of a 'mail plea' would not be interests of justice.

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## Rule 18 Striking juror for cause

State v. Eddington, \_\_\_\_ Ariz. \_\_\_\_, 244 P.3d 76 (Ct. App. 2010).

- Trial judge should have struck juror who worked for Sheriff's Office (the investigating agency of the crimes charged), & where juror knew nearly half of the state's witnesses.
- Peace officers are not automatically disqualified from serving as jurors.
- Trial court must dismiss a juror for cause where 'reasonable grounds to believe juror cannot render a fair & impartial verdict'.

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**Rule 18**  
**Striking juror for cause**

Eddington—

- Where a peace officer is employed by the same agency that conducted the investigation, that officer has an indirect interest in the case— and, must be stricken for cause.
- However, the error was harmless— Eddington struck the juror w/ peremptory challenge— he had a fair jury.

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**Rule 18**  
**Questions by Jurors**

State v. Villalobos, 225 Ariz. 74, 235 P.3d 227 (2010).

- In Agg. phase of murder trial, after state's mental health expert testified, trial judge refused to allow juror's question whether Defendant could be significantly reformed w/ medication or therapy— no error.
- Expert only testified about Defendant's personality & IQ scores— no diagnosis for treatment purposes.

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State v. Villalobos—

- Primary reason court found no reversible error was  
    No offer of proof as to what the answer to the juror's question might have been

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**Rule 19**  
**Defendant's allocation**

State v. Chappell, 225 Ariz. 229, 236 P.3d 1176 (2010).

- In Penalty phase of murder trial, trial judge warned Defendant that if he allocuted & disputed guilt, he would be subject to cross-examination
- Defendant argued on appeal that trial judge's warning prevented him from freely exercising his right of allocation.
- No abuse of discretion by trial judge in accurately informing him of consequences.

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**Rule 19**  
**Defendant's allocation**

State v. Womble, 225 Ariz. 91, 235 P.3d 244 (2010).

- Defendant claims that trial judge interfered w/ his right of allocation by reviewing his statement & noting:  
Comments by Defendant about suicidal thoughts would open the door to testimony by State's experts (that had been successfully precluded by defense)
- No error— trial judge's comment was a suggestion that Defendant was free to accept or not— consequences were accurate.

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**Rule 19.1**  
**Mistrial – Juror Misconduct**

State v. Gallardo, 225 Ariz. 560, 242 P.3d 159 (2010).

- Court learned that some jurors had discussed evidence during the trial.
- Trial court individually questioned all jurors. 3 jurors admitted violating admonition & discussing the case- likely that 4 others also had. 3 other jurors had formed opinions about the other jurors that would affect deliberations.
- Trial judge did not err in declaring mistrial for juror misconduct.

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**Rule 19.1**  
**Motion for Mistrial/victim's family**

State v. Kuhs, 223 Ariz. 376, 224 P.3d 192 (2010).

- Trial judge did not abuse discretion in denying Defendant's Motion for Mistrial when victim's stepmother cried audibly during the prosecutor's guilt phase closing argument, and was escorted out of the courtroom.
- "We previously have found that more substantial emotional outbursts in the jury's presence did not mandate a mistrial. In State v. Bible (citation omitted), for example, as the father of a murdered girl walked out of the courtroom, he referred to the defendant as "[t]hat f[\*\*\*]ing asshole" within earshot of the judge and jury."

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**Rule 20 Motion for Judgment of Acquittal**

State v. West, 224 Ariz. 575, 233 P.3d 1154 (Ct. App. 2010).

- Trial judge denied Defendant's Rule 20 motions at end of State's case and after presentation of all evidence, but granted a 'renewed motion' after jury's guilty verdicts.
- Trial judge erred in re-determining quantum of evidence, without any finding that it had considered improper evidence (or other error affecting evidence).

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**Rule 24.1 Motion for New Trial – Juror Misc.**

State v. Aguilar, 224 Ariz. 299, 230 P.3d 358 (Ct. App. 2010).

- 2 jurors conducted Internet research on definitions "first degree murder Arizona" and "premeditation". Internet definitions were not consistent with those given by the court. They shared this information with other jurors.
- Trial judge conducted a hearing & concluded that misinformation did not contribute to the jury's verdict.

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### **Rule 24.1 Motion for New Trial – Juror Misc**

Aguilar, continued—

- Defendant is entitled to new trial if it cannot be concluded beyond a reasonable doubt that the extraneous information did not contribute to the verdict. What about trial court's findings??
- When Defendant shows jury received extraneous information, prejudice is presumed, unless State proves BRD that information did not taint verdict.
- Here, Ct. of Appeals disagreed with trial judge & reversed & remanded for new trial.

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### **Rule 27.1 Terms of Probation**

Jacobsen v. Lindberg, 225 Ariz. 318, 238 P.3d 129 (Ct. App. 2010).

- Special Action proceeding brought by Jacobsen, who pled guilty to Luring Minor for Sexual Exploitation, and was required as term of probation (Sex Offender Terms) to take polygraph.
- Jacobsen told by PO that assertion of 5<sup>th</sup> Amendment privilege to any question would be violation of his probation.

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### **Rule 27.1 Terms of Probation**

Jacobsen v. Lindberg, continued—

- Ct. of Appeals disagreed with trial judge's ruling that ARS §13-4066 adequately protected Jacobsen's rights, holding that a probationer could be compelled to answer incriminating questions only after a grant of 'use immunity'.

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**Rule 27.3**  
**Mod. of Probation**

State v. Dean, 226 Ariz. 47, 243 P.3d 1029  
(Ct. App. 2010).

- Dean pled guilty to 2 cts Attempted Child Molestation committed between 1995-97. Sentence was 'lifetime probation'.
- APO moved to terminate Dean's probation in 2009 (7 years after Dean placed on probation) on basis that 'lifetime probation' was not available.

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**Probation**

State v. Dean, continued—

- In State v. Peek, 219 Ariz. 182, 195 P.3d 641 (2008), Az. Supreme Court held that 'lifetime probation' was not a lawful sentence from 1994 to 1997 when 13-902(E) failed to include Attempted Child Molest within offenses eligible for 'lifetime probation'.
- Trial court correctly modified the term of Dean's probation & terminated it per Rule 27.3.

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**Rule 27.4**  
**Early term. of probation**

State v. Lewis, \_\_\_ Ariz. \_\_\_, 244 P.3d 561  
(2011).

- Trial judge did not abuse discretion in terminating probation early, even though Lewis failed to complete all terms of probation.
- Rule 27.4 & ARS §13-901(E) permit a trial judge to terminate the probation of a Defendant who has not completed all terms of probation.

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**Rule 31.8(h) correction  
of the record on appeal**

State v. Diaz, 223 Ariz. 358, 224 P.3d 174, (2010),  
vacating 221 Ariz. 209, 211 P.3d 1193 (Ct. App.  
2009).

- Court of Appeals reversed verdicts of First Degree Burglary, Att. Armed Robbery, & Agg. Assault because court reporter omitted the polling of juror #6 & his answer of "yes" to question, "Is this your true verdict?". Defense contended that only 11 jurors rendered verdict & Defendant denied right to 12 person jury.
- Ct. of Appeals denied State's Motion for Reconsideration after reporter filed amended transcript containing juror #6's "yes" answer.

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**Rule 31.8(h) correction of  
the record on appeal**

Diaz, continued—

- Supreme Court reversed, finding several references in the record to 12 jurors, and no objections or complaints by anyone that a juror was missing.
- Better procedure: Rule 31.8(h) allows remand to trial court to determine what actually occurred, and appellate court may order sua sponte.

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**Rule 32.1(a)  
Post-Conviction Relief**

State v. Petty, 225 Ariz. 369, 238 P.3d 637 (Ct.  
App. 2010).

- Petty pled guilty and filed a timely Notice of Rule 32 claim (it was granted in part); thereafter, his counsel filed a 2<sup>nd</sup> Notice claiming ineffective assistance of his Rule 32 counsel (in the 1<sup>st</sup> petition) which was summarily dismissed.
- Trial court erred in dismissing 2<sup>nd</sup> petition as being precluded: defendant cannot waive claim not known at time of 1<sup>st</sup> petition.

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### **Rule 33.1 Criminal Contempt**

Stoddard v. Donahoe, 224 Ariz. 152, 228 P.3d 144 (Ct. App. 2010).

- Judge Donahoe found Detention Officer in contempt of court and ordered the officer to be incarcerated unless he offered a 'sincere apology' to the Defense Attorney (whose file he rifled w/out her permission).
- Nature of sanction imposed rendered this a 'civil contempt' not criminal. In cases of 'Civil contempt', incarceration is ordered to force compliance with a court order (such as apology).

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### **Supreme Court Rule 42, ER 5.1 & 5.3**

In Re Phillips, \_\_\_ Ariz. \_\_\_, 244 P.3d 549 (2010).

- Phillips suspended for 6 months for violating ER 5.1 & 5.3( failure to manage & supervise lawyers & non-lawyers). 12 violations: high volume of bankruptcy cases per attorney, use of non-lawyers to 'close deals' w/ clients, high-pressure tactics of firm administrators to keep clients.
- Hearing Officer did not use incorrect standard of vicarious liability, rather only found Phillips responsible for his personal violations of the ER's.

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